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No. 15-1439

IN THE

Supreme Court of the United States

CYAN, INC., ET AL.

Petitioner,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, ET AL.

Respondents.

On Writ of Certiorari to the Court of Appeal for the State of California, First Appellate District

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are prominent law professors whose scholarship and teaching focuses on the federal securities laws. This brief reflects the consensus of *amici* that Congress enacted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") to prevent plaintiffs from evading the Private Securities Litigation Reform Act ("PSLRA") by filing class actions alleging claims under the Securities Act of 1933 (the "Securities Act") in state court. In other words, Congress intended for SLUSA to make federal court the exclusive forum for such actions. *Amici* believe that this Court should interpret SLUSA in a way that promotes, rather than undermines, that purpose. *Amici* therefore agree that this Court should, as Petitioners assert, recognize that SLUSA amended the jurisdictional provision of the Securities Act, Section 22(a), to divest state courts of jurisdiction over Securities Act

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby state that no counsel for Petitioner or Respondent authored any part of this brief, and no person other than *amicus curiae* or its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a) of the Rules of this Court, letters of consent from all parties to the filing of this brief are on file or have been submitted to the Clerk of the Court.

class actions.[2] Each individual *amicus*, however, may not endorse every argument made in this brief.

Elizabeth Cosenza is an Associate Professor of Law and Ethics at Fordham University's Gabelli School of Business and Chair of the Law and Ethics Department.

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[2] *Amici* also agree that the alternate interpretation of SLUSA advanced by the United States in its *amicus curiae* brief would promote SLUSA's underlying purpose.

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SUMMARY OF ARGUMENT

In 1995, Congress enacted the PSLRA to protect issuers from *in terrorem* securities class action lawsuits. But, because most of the PSLRA's provisions only apply in federal court, plaintiffs quickly learned to avoid the PSLRA by filing securities class actions in state court. In response, Congress enacted SLUSA. SLUSA had two core purposes: to ensure that the protection against *in terrorem* lawsuits granted by the PSLRA applied to *all* class action lawsuits involving nationally traded securities, and, in the process, to subject those class actions to uniform standards. To accomplish these goals, Congress intended to make federal court the exclusive venue for class actions involving nationally traded securities.

Nevertheless, even after SLUSA, some courts, particularly in California, have continued to permit plaintiffs to file Securities Act class actions in state court. These decisions undermine all of SLUSA's purposes. By generating a flood of Securities Act litigation in California state court, these decisions have ensured that plaintiffs can continue to evade the PSLRA. And, in turn, these state proceedings lead to inconsistent interpretations of the Securities Act. As shown in Appendices A and B, Securities Act class actions in state and federal courts have markedly different dismissal rates. Between 2011 and 2016, federal courts dismissed 31% of cases filed with only Securities Act claims, whereas state courts

in California dismissed only *three of forty-seven*[3] such cases without leave to amend. Indeed, state courts have permitted cases to proceed even when the complaint is based on the *same factual scenario* that federal courts have repeatedly rejected as insufficient to sustain a Securities Act claim.

Finally, the different legal standards applied in state court lead to an increase in *in terrorem* settlements. The median settlement for Securities Act class actions filed in state court is almost *double* the median settlement for corresponding class actions filed in federal court. The decisions permitting Securities Act litigation to proceed in California state court therefore cannot be reconciled with SLUSA's purposes.

In its recent decision interpreting the Affordable Care Act, this Court recognized that "if at all possible, we must interpret the act in a way that is consistent with" Congress's goal in passing the ACA. *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). This Court therefore rejected an interpretation that would "likely create the very 'death spirals' that Congress designed the Act to avoid." *Id.* at 2493. Here, SLUSA's purpose of preventing *in terrorem*

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[3] In one of those three cases, the court did not rule that the complaint failed to state a claim. Instead, the court determined that it could not exercise personal jurisdiction over the defendants. *See* Appendix B.

settlements and ensuring a uniform application of the securities laws can only be promoted by recognizing that—as Petitioners contend—SLUSA's jurisdictional amendments divested state courts of jurisdiction over Securities Act cases. *Amici* urge this Court to adopt that interpretation.

ARGUMENT

I. CONGRESS ENACTED SLUSA TO CLOSE THE JURISDICTIONAL LOOPHOLE CREATED BY THE PSLRA AND ENSURE A UNIFORM INTERPRETATION OF BOTH THE SECURITIES ACT AND SLUSA.

A. THE PSLRA OFFERED DEFENDANTS PROTECTIONS AGAINST ABUSIVE SUITS FILED IN FEDERAL COURT, BUT INADVERTENTLY SHIFTED SECURITIES ACTIONS TO STATE COURTS.

In 1995, Congress recognized that the Securities Act's "class-action device was being used to injure 'the entire U.S. economy.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (quoting H.R. Rep. No. 104-369, at 31 (1995)). "[N]uisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent' had become rampant." *Id.* Congress was particularly concerned about plaintiffs who "abuse[d] the discovery process to impose costs so burdensome that it [was] often

economical for the victimized party to settle"—even if they had done nothing wrong. H.R. Rep. No. 104-369, at 31. "[T]hese abuses resulted in extortionate settlements, chilled any discussion of issuers' future prospects, and deterred qualified individuals from serving on boards of directors." *Dabit*, 547 U.S. at 81.

In response, Congress passed the PSLRA, which contains several provisions designed to protect issuers from strike suits and the costs of litigation. Most significantly, under the PSLRA, plaintiffs no longer have immediate access to discovery. Instead, "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss." 15 U.S.C. § 77z-1(b). The PSLRA also targets meritless actions by requiring courts to include findings regarding compliance with Rule 11 and issue sanctions for any violation when every Securities Act class action concludes. 15 U.S.C. § 77z-1(c). In addition, to prevent "professional plaintiffs" from filing putative class actions every time a public company's stock loses value, plaintiffs must certify that they have reviewed the complaint, did not purchase the security at the direction of counsel or to participate in the suit, and must identify other Securities Act actions in which they were a plaintiff in the last three years. 15 U.S.C. § 77z-1(a)(2). Similarly, the PSLRA provides a process for the appointment of lead plaintiff, requiring the plaintiff who first files a lawsuit to publish notice of the suit so that other investors can apply to serve as lead

plaintiff. 15 U.S.C. § 77z-1(a)(3)(A). The PSLRA also creates a presumption that the applicant who has the "largest financial interest" in the action should be selected as lead plaintiff. 15 U.S.C. § 77z-1(a)(3)(B)(iii).

The PSLRA, however, contained a fatal flaw: almost none of the protections it provides apply to actions filed state court. Many provisions apply only to actions brought "pursuant to the Federal Rules of Civil Procedure," *i.e.*, brought in federal court. 15 U.S.C. § 77z-1(a). For instance, none of the PSLRA's provisions governing the appointment of a lead plaintiff apply in state court. *See id.* And, although the discovery stay does not have this express limitation, state courts usually do not stay discovery.[4] This is particularly important because the costs of discovery mount quickly and often can force defendants to settle a claim before a court is even able to rule on a motion to dismiss.

Moreover, state courts offer other advantages to plaintiffs intent on extracting a nuisance settlement. Plaintiffs in state court can avoid consolidation with federal actions asserting the same

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[4] *See* Douglas H. Flaum, et al., *Why Section 11 Class Actions Are Proliferating in California*, LAW360, April 27, 2015; *see also* Priya Cherian Huskins, *IPO Companies, Section 11 Suits and California State Court*, D&O Notebook, April 26, 2016, https://wsandco.com/do-notebook/ipo-companies-section-11-suits-california-state-court.

claims, leading to identical cases proceeding simultaneously in federal and state court. These competing actions may produce inconsistent decisions. As discussed in greater detail below, state courts have interpreted the Securities Act quite differently from their federal counterparts, and have refused to dismiss actions that would quickly be rejected in federal court.

Unsurprisingly, then, "[r]ather than face the obstacles set in their path," the PSLRA "prompted at least some members of the plaintiffs' bar to avoid the federal forum altogether." *Dabit*, 547 U.S. at 82. As one report submitted to Congress in 1997 described, after the passage of the PSLRA, plaintiffs frequently "resort[ed] to state court" or filed parallel litigation in "state and federal courts in an apparent effort to avoid the federal discovery stay or other provisions of the [PSLRA]." H.R. Rep. No. 105-803, at 14 (1998) (emphasis added); H.R. Rep. No. 105-640, at 10 (1998); *see also* S. Rep. No. 105-182, at 3 (1998). This shift was unprecedented—the SEC called it "potentially the most significant development in securities litigation" since the passage of the PSLRA. H.R. Rep. No. 105-803, at 14 (internal quotations and citation omitted).

B. CONGRESS ENACTED SLUSA TO CLOSE THE JURISDICTIONAL LOOPHOLE CREATED BY THE PSLRA.

Congress enacted SLUSA to end plaintiffs' new practice of filing class actions involving nationally traded securities in state court. As SLUSA's House and Senate managers explained, Congress was spurred to act by the "determin[ation] that since passage of the [PSLRA], plaintiffs' lawyers have sought to circumvent the Act's provisions by exploiting differences between Federal and State laws by filing frivolous and speculative lawsuits ***in State court***, where essentially none of the [PSLRA's] procedural or substantive protections against abusive suits are available." H.R. Rep. No. 105-803, at 14-15 (emphasis added). Indeed, SLUSA itself observes that the shift of "a number of securities class action lawsuits . . . ***from Federal to State courts***," had "prevented [the PSLRA] from fully achieving its objectives." Pub. L. No. 105-353, §§ 2(2)-(3), 112 stat. 3227 (emphasis added). "The purpose of [SLUSA was therefore] to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation ***by filing suit in State, rather than in Federal, Court***." H.R. Rep. No. 105-803, at 13 (emphasis added).

Congress decided that "[t]he solution to this problem [was] to ***make Federal court the exclusive venue*** for most[5] securities fraud class action litigation involving nationally traded securities." *Id.* at 15 (emphases added). The bill's managers believed that SLUSA did just that—it "***ma[de] federal court the exclusive venue*** for most class action lawsuits," *id.* at 13 (emphasis added), thereby ensuring that "securities class action lawsuits involving nationally traded securities" would be subject to "national standards." Pub. L. No. 105-353, § 2(5), 112 Stat. 3227 (1998); *see also Knox v. Agria Corp.*, 613 F. Supp. 2d 419, 421 (S.D.N.Y. 2009).

During the legislative debates over SLUSA, individual members of Congress frequently reaffirmed the bill's core purpose. In statement after statement, both Democrats and Republicans explained that SLUSA would ensure that securities class actions involving nationally traded securities were litigated in federal court:

- Representative Harman: SLUSA would "generally proscribe bringing a private class action suit involving 50 or more parties except

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[5] The reason for references to "most" class actions is simple: SLUSA carved out from its broad preclusion provision a small set of class actions arising under state law. *See* 15 U.S.C. §§ 77p(d)(1)-(3). SLUSA has no such carveout for class actions asserting federal claims.

in Federal court." 144 Cong. Rec. E1424 (daily ed. July 23, 1998) (statement of Rep. Harman).

- Representative Lofgren: SLUSA "will finally slam the door on strike suits by establishing Federal court as the exclusive venue for securities class actions." 144 Cong. Rec. E1383 (daily ed. July 21, 1998) (statement of Rep. Lofgren).

- Representative Bliley: "The premise of this legislation is simple: lawsuits alleging violations that involve securities that are offered nationally belong in Federal court." 144 Cong. Rec. H11019-22, at H11020 (daily ed. Oct. 13, 1998) (statement of Rep. Bliley).

- Senator Kerry: SLUSA "mov[es] all class action securities lawsuits to federal court." 144 Cong. Rec. S4778-03, S4802 (daily ed. May 13, 1998) (statement of Sen. Kerry).

- Senator Reid: "State court litigation is a loophole around the PSLRA" and the failure to pass SLUSA "will cause a proliferation of litigation in state courts." *Id.* at S4799 (Sen. Reid).

- Senator Feinstein: "[S]uits traditionally filed in federal courts are now being placed in state courts" and SLUSA "will protect companies from this side-door tactic" by "establishing a uniform system for the movement of cases

from state to federal court." *Id.* at S4797 (Sen. Feinstein).

- Senator Grams: "[T]his Act simply requires that class action lawsuits against nationally traded securities be filed in Federal court." *Id.* at S4802 (Sen. Grams).

Other key actors expressed the same understanding. President Clinton explained that "the uniform standards provided by this legislation state that class actions ***generally can be brought only in Federal court***, where they will be governed by Federal law . . . ." Presidential Statement on Signing the Securities Litigation Uniform Standards Act of 1998, 34 WEEKLY COMP. PRES. DOC. 45, at 2248 (Nov. 3, 1998) (emphasis added).

Even an organization of plaintiffs' counsel, the National Association of Securities and Commercial Law, recognized that SLUSA "***would eliminate even Federal cases from being heard in State courts***," and the "States would be precluded from hearing actions under the 1933 Act . . . ." *Hearing Before the Subcomm. on Sec. of the Comm. on Banking, Hous., & Urban Affairs*, 105th Cong. 64 (Oct. 29, 1997) (prepared statement of Herbert E. Milstein) (emphasis added).

Congress spoke with one voice when it passed SLUSA. It enacted SLUSA to keep all securities fraud class actions in federal court, where they

would be subject to the PSLRA and uniform standards.

C. THIS COURT'S INTERPRETATION OF SLUSA SHOULD BE INFORMED BY THE CLEAR CONGRESSIONAL PURPOSE OF CLOSING THE JURISDICTIONAL LOOPHOLE.

In evaluating the competing interpretations of SLUSA advanced by the parties here, this Court should keep SLUSA's ultimate purpose of making federal court the "exclusive venue" for securities class actions in mind. This Court has refused to "interpret federal statutes to negate their own stated purposes." *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 419-420 (1973). Rather, as this Court recently held in its review of the Affordable Care Act, courts should (if possible) adopt the statutory reading that comports with the intent of the statute as a whole: "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter." *King*, 135 S. Ct. at 2496; *see also id.* at 2493 (rejecting interpretation that would "likely create the very 'death spirals' that Congress designed the Act to avoid"); *see generally Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486, 492 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the

statute, and consulting any precedents or authorities that inform the analysis.").

As Congress recognized, SLUSA's core purposes of closing the jurisdictional loophole and promoting a uniform interpretation of the securities laws can only be advanced by making federal courts the exclusive venue for securities class actions. And, as Petitioners explain, Congress amended the jurisdictional provision of the Securities Act, Section 22(a), to do just that. Brief for Petitioners at 14-16, *Cyan v. Beaver County Employees Ret. Fund*, No. 15-1439 (U.S. August 28, 2017). SLUSA amended Section 22(a) to divest state courts of jurisdiction over "covered class actions," *i.e.*, all Securities Act class actions or non-class actions brought on behalf of more than 50 claimants. *See id.* at 7-8, 14-16. Congress's amendment to Section 22(a) therefore ensured that SLUSA achieved the result it set out to accomplish by making federal court the exclusive forum for Securities Act class actions.[6]

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[6] In an *amicus curiae* brief, the United States argued that SLUSA amended Section 16 of the Securities Act to permit the removal of Securities Act class actions to federal court. Brief for the United States as Amicus Curiae at 13-15, *Cyan v. Beaver County Employees Ret. Fund*, No. 15-1439 (U.S. May 23, 2017). Permitting defendants to remove Securities Act class actions would also promote SLUSA's purposes of closing the jurisdictional loophole and promoting uniformity by ensuring that Securities Act class actions can be litigated in federal court.

In contrast, Respondent's interpretation would frustrate SLUSA's purpose. According to Respondent, SLUSA precludes plaintiffs from filing class actions based on state law (and permits defendants to remove such claims to federal court), but did nothing to prevent plaintiffs from taking an alternate path around the PSLRA—filing federal securities class actions in state court. *See* Respondent's Opposition to Petitioner's Request for Writ of Certiorari at 3, *Cyan v. Beaver County Employees Ret. Fund*, No. 15-1439 (U.S. May 23, 2017). In other words, Respondent's interpretation preserves the very jurisdictional loophole Congress sought to eliminate.

Concluding that state courts retain jurisdiction over federal class actions would lead to the bizarre situation where class actions alleging only state claims or both state and federal claims may be removed to federal court, but those alleging only federal claims must remain in state court. *See Knox*, 613 F. Supp. 2d at 425. There is no reason Congress would leave such an obvious gap in an act designed to promote the uniform interpretation of the securities laws. *Cf. Sheridan v. United States*, 487 U.S. 392, 403 (1988) (rejecting interpretation of Federal Tort Claims Act that would require the "odd assumption" that government had duty to prevent negligent harm but not intentional harm).

Moreover, by allowing Securities Act class actions to proceed in state court, Respondent's interpretation undercuts Congress's goal of creating

"national standards for securities lawsuits involving nationally traded securities." Pub. L. No. 105-353, § 2(5), 112 stat. 3227 (1998). State court decisions at the trial court level, unlike federal courts, rarely result in published—or even readily available unpublished—opinions. As this Court has noted, an important objective of the securities laws is "to maintain public confidence in the marketplace," which is achieved in part through private enforcement of the securities laws. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005). The lack of publicly available decisions hinders the uniform application of the securities laws.[7]

State court decisions also undermine uniformity when they directly contradict federal precedent. State courts are not bound by federal court decisions, except for those of this Court.[8] Thus,

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[7] Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 989 (2008) ("[E]veryone who has empirically studied the issue has concluded that . . . the general unavailability of unpublished opinions potentially leads to a misconception of the law itself.").

[8] *See McLaughlin v. Walnut Properties, Inc.*, 119 Cal. App. 4th 293, 297 (Cal. Ct. App. 2004) ("Since we are construing a federal statute, we must apply and interpret federal law. Decisions of the United States Supreme Court are binding. Lower federal court decisions, including those of the Ninth Circuit Court of Appeal, are not. If federal precedent is either lacking or in conflict, we will independently determine federal law.").

if this Court adopts Respondent's view, each state will be a circuit unto itself, leading to a patchwork of legal standards for nationally traded securities.[9] This is particularly troubling because, while federal courts have addressed the issues presented in securities class actions since the Securities Act's enactment, most state courts have little or no familiarity with the federal securities laws. This lack of familiarity with the issues manifests itself in a mosaic of inconsistent rulings. *See* Section II, *infra*. Competing interpretations of the same statute create uncertainty, and, as this court recently observed, such uncertainty "can put defendants at added risk in conducting business going forward, causing destabilization in markets which react with sensitivity to these matters." *See California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2053 (2017).

Respondent's interpretation of SLUSA simply cannot be reconciled with SLUSA's purpose. Congress passed SLUSA to end the very practice at issue here—the filing of Securities Act class actions in state court. SLUSA can, and should, be read in a way that furthers that goal.

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[9] *See Unschuld v. Tri-S Sec. Corp.*, No. 1:06-CV-02931-JEC, 2007 WL 2729011 at *8-9 (N.D. Ga. Sept. 14, 2007).

II. THERE ARE SIGNIFICANT LEGAL AND ECONOMIC CONSEQUENCES WHEN PLAINTIFFS FILE SECURITIES ACT CLAIMS IN STATES SUCH AS CALIFORNIA.

The recent spate of Securities Act class actions filed in California state courts demonstrates the incompatibility of Respondent's interpretation with SLUSA's core purpose. Many state and federal courts in California have permitted plaintiffs to bring Securities Act class actions in state court. Plaintiffs quickly responded, and California is now the forum of choice for shareholders filing Securities Act class actions. And, because Defendants in California cannot rely on either the PSLRA or the federal courts' familiarity with the Securities Act, plaintiffs are able to extract generous settlements in these actions. In other words, in California, issuers are now confronted with ***exactly the same problems*** that prompted Congress to enact SLUSA in 1998.

In 2013, the federal district courts in California issued a series of decisions remanding Securities Act class actions to California state court under Respondent's proposed interpretation of SLUSA. *See Plymouth Cty. Ret. Sys. v. Model N, Inc.*, No. 14-CV-04516-WHO, 2015 WL 65110, at *3 (N.D. Cal. Jan. 5, 2015) ("Since 2013, however, every court in this district to address the issue has granted remand."). The result has been a flood of Securities Act class actions filed in California state court. In 2014, only five such cases were brought in California

state court. In 2015, fifteen cases were filed. In 2016, *eighteen* such cases were filed.[10]

Moreover, Plaintiffs are filing cases in California state court even where the Company is headquartered in another state and has almost no connection to California itself. For instance, in *Cervantes v. Dickerson*, the plaintiff alleged Securities Act claims based on the registration statements of Etsy, a Delaware corporation headquartered in New York. No. 1:15-cv-534768, Complaint ¶ 14 (San Mateo Sup. Ct. July 21, 2015). The Company's executive officers resided in New York, and the statements at issue were presumably drafted there. *See id.*, ¶¶ 15-16. The case had almost no connection to California. The only connection was that one of the Company's five directors lived in California, and the company and its underwriters had satellite offices in the state. *Id.*, ¶¶ 17, 21-22. Nevertheless, the plaintiffs brought their Securities Act claims in California state court, apparently because, like other plaintiffs, they believed that California state court is a more favorable forum for their Securities Act claims.

Plaintiffs are right. For the reasons discussed above, the cases filed in California state court have quite different outcomes than those filed in federal

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[10] Cornerstone Research, *Securities Class Action Filings*, 2017 Midyear Assessment at 12 (2017).

court. For instance, between 2011 and 2016, federal courts dismissed 31% of cases with only Securities Act claims.[11] *See* Appendix A. However, from 2011 to 2016, of the 47 such cases filed in California state courts, only *three* (or 6%) have been involuntarily dismissed. *See* Appendix B.

Indeed, California courts have decided cases differently from federal courts in parallel proceedings based on the *same allegedly misleading statements*. In 2016, different plaintiffs filed parallel state and federal Securities Act proceedings against Sunrun, a solar energy company. *Compare Pytel v. Sunrun, Inc.*, No. CIV538215, Consolidated Complaint ("State Complaint") (San Mateo Sup. Ct. Oct. 17, 2016) *with Greenberg v. Sunrun, Inc.*, No. 3:16-cv-2480-CRB, Consolidated Amended Complaint ("Federal Complaint") (N.D. Cal. Oct. 21, 2016). The two complaints challenged many of the same statements. Both complaints claimed that the registration statement accompanying Sunrun's IPO misled investors because (1) Sunrun did not disclose legislative and regulatory developments in Nevada relating to solar power, *compare* State Complaint ¶¶ 35-36 *with* Federal Complaint ¶ 81; (2) Sunrun made misleading statements about "predictable pricing," *compare* State Complaint ¶ 39 *with* Federal

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[11] This figure does not include cases remanded to state court, because any motion to dismiss in such cases is ultimately filed in state court. *See* Appendix A.

Complaint ¶ 86; and (3) Sunrun made misleading statements about customer concentration. *Compare* State Complaint ¶ 50(c) *with* Federal Complaint ¶ 84.

These similarities, however, did not lead to the same result. While the District Court for the Northern District of California dismissed the Federal Complaint, the Superior Court of San Mateo County allowed the State Complaint to proceed. *Compare Pytel v. Sunrun, Inc.*, No. CIV538215, Minute Order at 1-2 (Jan. 13, 2017) (overruling Sunrun defendants' demurrer) *with Greenberg v. Sunrun Inc.*, 233 F. Supp. 3d 764, 775 (N.D. Cal. 2017) (dismissing complaint with prejudice because Sunrun's statements were not misleading). Indeed, in his opinion, Judge Breyer of the Northern District of California explicitly noted that he "*respectfully disagree[d] with some parts of Judge Weiner's decision in the parallel state court litigation.*" *Greenberg*, 233 F. Supp. 3d at 775 n.5 (emphasis added). Thus, in addition to unnecessarily burdening both the parties and the courts, the parallel proceedings permitted by Respondent's interpretation of SLUSA have generated inconsistent interpretations of the same company's obligations under the Securities Act.

State courts have also failed to follow federal precedent even when presented with nearly identical situations. For example, in *In re Stac Electronics Securities Litigation*, 89 F.3d 1399 (9th Cir. 1996), the Ninth Circuit held that Stac Electronics did not

have a duty to disclose a different company's plans to investors because it could never know if the other company would follow through with those plans. *Id.* at 1407. In *Stac*, most of Stac's revenue came from the sales of a "data compression device which double[d] storage capacity in computers using Microsoft's MS-DOS." *Id.* at 1401. Stac repeatedly warned investors that its revenues could decline if Microsoft itself introduced its own, similar product. *See id.* at 1402. Nevertheless, the plaintiffs argued that Stac misled investors by failing to disclose that Microsoft had *actually* developed a competitor product that it planned to "introduc[e] . . . in its upcoming version of DOS." *Id.* at 1405. The Ninth Circuit rejected these allegations, explaining that Stac had no duty to disclose Microsoft's plans because "another company's plans cannot be known to a certainty" and "Stac could not have known whether Microsoft would truly [introduce the competitor product]." *Id.* at 1407.

In 2012, in a case presenting a virtually identical scenario, a California state court refused to follow the precedent set by *Stac*. According to the Complaint in *Robinson v. Audience*, most of Audience's revenue came from the sale of noise cancellation technology that Apple used in its iPhones. *Robinson v. Audience, Inc.*, No. 1:12-cv-232227, First Amended Complaint ¶¶ 29-30 (Santa Clara Sup. Ct. Sept. 13, 2012). Audience repeatedly warned its customers that Apple could develop its own noise cancellation technology internally, and

use its own technology to replace Audience's product in future iPhone models. *See Robinson v. Audience, Inc.*, No. 1:12-cv-232227, Defendants' Reply in Support of Demurrer to First Amended Complaint at 3 (Santa Clara Sup. Ct. June 28, 2013). Nevertheless, the plaintiffs argued that Audience misled investors by failing "to disclose that Apple had in fact already decided to develop its own technology to replace Audience's product in the iPhone 5." *Robinson v. Audience, Inc.*, No. 1:12-cv-232227, First Amended Complaint ¶ 42 (Santa Clara Sup. Ct. Sept. 13, 2012).

The two cases therefore contained the same factual scenario, the same theory of falsity, and the same legal claims. The only difference between *Stac* and *Audience* was the result. In *Audience*, the Santa Clara Superior Court ignored *Stac*'s conclusion that Audience had no duty to disclose Apple's plans, and instead held that "[t]he Audience Defendants' lack of actual knowledge is not dispositive since they may be liable under Section 11 for innocent or negligent material misstatements or omissions." *Robinson v. Audience, Inc.*, No. 1:12-cv-232227, slip op. at 7 (Santa Clara Sup. Ct. Sept. 3, 2013). Thus, by filing in state court, the *Audience* plaintiffs avoided not only the PSLRA, but controlling precedent that should have doomed their claims.

These differences between federal and state court can lead to larger settlements. Between 2011 and 2016, cases filed in federal court asserting only Securities Act claims had a median settlement

amount of $4.425 million. *See* Appendix D. In contrast, the median settlement amount for such cases filed in California state court since 2011 was $8.5 million. *See* Appendix C. This is *exactly* the outcome Congress sought to avoid when it passed SLUSA. Congress sought to prevent plaintiffs from taking advantage of the differences between state and federal court, not to allow that practice to continue.

In sum, following the adoption of Respondent's proposed interpretation of SLUSA by California courts, plaintiffs have flocked to California, and in the process, ensured that defendants cannot rely on either the federal courts' expertise or the PSLRA. Under such circumstances, Securities Act claims are dismissed much less frequently and Defendants often pay more to settle even nuisance suits. Congress enacted SLUSA to put an end to these very disparities. Accordingly, this Court's interpretation of SLUSA's jurisdictional provision should be consistent with Congress's intent to make federal courts the exclusive forum for securities class actions, thus ensuring the uniform application of the federal securities laws.

CONCLUSION

For all of the reasons set forth above, *amici* respectfully request that this Court reverse the decision of the Court of Appeal for the State of California, First Appellate District, and make federal courts the exclusive jurisdiction for federal securities class actions.

Respectfully submitted,

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SEPTEMBER 5, 2017

Appendix A

APPENDIX A

Case Outcomes for Federal Class Actions Filed from 2011-2016
Filings with Section 11 Claims and No Rule 10b-5 Claims[1]

	Filing Date	Docket	Case Name	Circuit	Court	Case Status
1.	2/7/2011	11-CV-02769	Dan Katz v. China Century Dragon Media, Inc. et al	9th	C.D. California	Settled
2.	3/3/2011	11-CV-01461	Jack Shrader, et al. v. FXCM Incorporated, et al.	2nd	S.D. New York	Dismissed - Voluntary
3.	3/11/2011	11-CV-00624	MHC Mutual Conversion Fund, L.P. , et al. v. United Western Bancorp, Inc., et al.	10th	D. Colorado	Dismissed - Involuntary
4.	4/1/2011	11-CV-02794	Robert Stanger v. China Electric Motor, Inc., et al.	9th	C.D. California	Settled
5.	4/1/2011	11-CV-02768	Michael Stern v. China Intelligent Lighting and Electronics, Inc., et al.	9th	C.D. California	Settled
6.	5/6/2011	11-CV-03936	Gary Redwen v. Sino Clean Energy Inc et al.	9th	C.D. California	Settled
7.	5/12/2011	11-CV-00520	Northumberland County Retirement System, et al. v. GMX Resources, Inc., et al.	10th	W.D. Oklahoma	Settled
8.	6/17/2011	11-CV-02919	Nancy Kowalski, et al. v. Apple REIT Ten, Inc., et al.	2nd	E.D. New York	Dismissed - Involuntary
9.	7/29/2011	11-CV-11359	Washtenaw County Employees' Retirement System v. The Princeton Review, Inc. et al.	1st	D. Massachusetts	Dismissed - Involuntary
10.	8/19/2011	11-CV-05831	Bhushan Athale, et al. v. SinoTech Energy Limited, et al.	2nd	S.D. New York	Settled[3]
11.	10/25/2011	11-CV-81184	Martin J Fuller, et al. v. Imperial Holdings, Inc, et al.	11th	S.D. Florida	Settled
12.	10/28/2011	11-CV-01033	Karsten Schuh, et al. v. HCA Holdings, Inc., et al.	6th	M.D. Tennessee	Settled
13.	10/28/2011	11-CV-07673	McKenna et al v. Smart Technologies, Inc. et al.	2nd	S.D. New York	Settled
14.	11/14/2011	11-CV-81270	Greenfield Childrens Partnership, et al. v. FriendFinder Networks, Inc., et al.	11th	S.D. Florida	Dismissed - Involuntary
15.	11/23/2011	11-CV-05669	Matthew Sandnas, et al. v. Pacific Biosciences of California, Inc., et al.	9th	N.D. California	Remanded to State Court
16.	11/28/2011	11-CV-08622	Barbara Blazer, et al. v. Apple REIT Nine, Inc., et al.	2nd	S.D. New York	Dismissed - Voluntary
17.	2/6/2012	12-CV-00373	Matthew A. Brady, et al. v. Kosmos Energy Ltd., et al.	5th	N.D. Texas	Settled
18.	5/23/2012	12-CV-04081; consolidated with MDL 1:12-md-02389-RWS	Brian Roffe Profit Sharing Plan, et al. v. Facebook, Inc., et al.	2nd	S.D. New York	Ongoing
19.	5/25/2012	12-CV-04191	David Schottenstein, et al. v. Credit Suisse AG, et al.	2nd	S.D. New York	Dismissed - Involuntary
20.	5/25/2012	12-CV-00054	Ming Yang, et al. v. Tibet Pharmaceuticals, Inc., et al.	3rd	D. Virgin Islands	Settled[4]
21.	6/20/2012	12-CV-04839	Todd Augenbaum, et al. v. Lone Pine Resources, Inc., et al.	2nd	S.D. New York	Dismissed - Involuntary
22.	6/29/2012	12-CV-05124	George Scott, et al. v. Whitacre, et al.	2nd	S.D. New York	Dismissed - Involuntary
23.	7/20/2012	12-CV-02196	Chaz Campton, et al. v. Ignite Restaurant Group, Inc., et al.	5th	S.D. Texas	Settled
24.	8/16/2012	12-CV-04377	Olivia Niitsoo, et al. v. Alpha Natural Resources, Inc., et al.	4th	S.D. West Virginia	Remanded to State Court
25.	10/12/2012	12-CV-81123	Francis Howard, et al. v. Chanticleer Holdings, Inc., et al.	11th	S.D. Florida	Settled
26.	11/2/2012	12-CV-05636	Michael Toth, et al. v. Envivio, Inc., et al.	9th	N.D. California	Remanded to State Court

Cases Not Remanded to State Court:

Status Summary	Counts	Percentage
Dismissed – Voluntary	5	9%
Dismissed - Involuntary	18	31%
Settled	24	41%
Ongoing	11	19%
Total	58	100%

Sources:
Cornerstone Research; Stanford Securities Litigation Analytics

Note:
[1] Other claims may or may not be present.
[2] The plaintiffs reached a settlement agreement with the primary defendants, and the court later dismissed the plaintiff's claims against the defendant company's accountants.
[3] The plaintiffs reached a settlement agreement with the primary defendants, although the case remains ongoing.
[4] On March 1, 2017, Plaintiffs appealed the district court's order dismissing their complaint with prejudice to the Second Circuit.
[5] On April 21, 2017, Defendants appealed the district court's order granting Plaintiffs' motion to remand to state court to the Ninth Circuit.

Appendix B

APPENDIX B

'33 Act Class Actions Filed in California State Courts from 2011-2016

	Filing Date	Case Name	Case No.	Case Status
1.	July 1, 2011	West Virginia Laborers' Trust Fund v. STEC, Inc.	Orange County 30-2011-00489022	Dismissed - Voluntary[1]
2.	Sept. 27, 2011	Harper v. Smart Technologies, Inc.	San Francisco County CGC-11-514673	Dismissed - Voluntary[2]
3.	Oct. 21, 2011	Young v. Pacific Biosciences of California, Inc.	San Mateo County CIV509210	Settled
4.	Mar. 13, 2012	Marcano v. Nye (Zeltiq Aesthetics, Inc.)	Alameda County RG12621290	Dismissed - Involuntary
5.	May 22, 2012	Lazar v. Facebook, Inc.	San Mateo County CIV514065, removed to federal court on June 21, 2012 N.D. Cal. 12-CV-03199 and transferred on Oct. 9, 2012 to S.D.N.Y 1:12-MD-02389-RWS	Removed to federal court
6.	Aug. 1, 2012	Reyes v. Zynga Inc.	San Francisco County CGC-12-522876	Dismissed - Voluntary[3]
7.	Sept. 13, 2012	Robinson v. Audience, Inc.	Santa Clara County 1-12-CV-232227	Settled
8.	Oct. 19, 2012	Toth v. Envivio, Inc.	San Mateo County CIV517481, consolidated on Nov. 22 2013 San Mateo County CIV517185	Settled
9.	July 10, 2013	Desmarais v. Johnson (CafePress Inc.)	San Mateo County CIV522744	Settled
10.	Apr. 1, 2014	Beaver County Employees Retirement Fund v. Cyan, Inc.	San Francisco County CGC-14-538355	Ongoing
11.	Apr. 3, 2014	Rajasekaran v. CytRx Corp.	Los Angeles County BC541426	Ongoing[4]
12.	June 20, 2014	In re FireEye, Inc. Securities Litigation	Santa Clara County 1-14-CV-266866	Settled
13.	July 1, 2014	Welch v. Pacific Coast Oil Trust	Los Angeles County BC560944, consolidated on Nov. 18, 2014 Los Angeles County BC550418	Settled
14.	Sept. 5, 2014	Plymouth County Retirement System v. Model N, Inc.	San Mateo County CIV530291	Settled

[1] This case was voluntarily dismissed due to resolution of a related securities class action in federal court in the Central District of California, which was settled on May 23, 2013. Decl. in Support of Plaintiff (Req. for Dismissal), *West Virginia Laborers' Trust Fund v. STEC, Inc.*, Case No. 30-2011-00489022 (Orange Cty. August 16, 2013).

[2] Plaintiffs voluntarily dismissed their claims after the final settlement of a related Section 11 case in federal court. Memorandum of Law in Support of Pl.'s Mot. for Voluntary Dismissal, Case No. CGC-11-514673 (San Francisco Cty. Super. Ct. Sept. 30, 2014).

[3] Plaintiff requested voluntary dismissal on the basis that Plaintiff no longer wished to participate in the suit individually, and purported class members were included within the class of a pending federal action. Pl.'s Unopposed Req. for Voluntary Dismissal of Action, *Reyes v. Zynga Inc.*, Case No. CGC-12-522876 (San Francisco Cty. Super. Ct. Feb. 4, 2015).

[4] This case was stayed pending resolution of a related federal action in which Plaintiff was an interested party and which settled on May 18, 2016. *Chen v. CytRx Corp., et al.*, Case No. 2:14-cv-01956-GHK-PJW (C.D. Cal. May 18, 2016). While the docket refers to the case being closed, there is not an official order dismissing the case, therefore, it has been listed as ongoing.

	Filing Date	Case Name	Case No.	Case Status
43.	Aug. 18, 2016	Jackie888, Inc. v. Tokai Pharmaceuticals, Inc.	San Francisco County CGC-16-553796	Ongoing[13]
44.	Sept. 1, 2016	Ramsay v. Pure Storage, Inc.	San Mateo County 16CIV01183	Ongoing
45.	Sept. 20, 2016	Jackie888, Inc. v. Rewalk Robotics Limited	San Mateo County 16CIV01454	Dismissed - Involuntary[14]
46.	Nov. 4, 2016	Hosey v. Costolo (Twitter, Inc.)	San Mateo County 16CIV02228	Ongoing
47.	Nov. 18, 2016	Book v. ProNai Therapeutics, Inc.	San Mateo County 16CIV02473	Ongoing

Sources:
Cornerstone Research; Stanford Securities Litigation Analytics

All Filings:

Status Summary	Counts	Percentage
Dismissed - Voluntary	4	9%
Dismissed - Involuntary	3	6%
Settled	15	32%
Removed to federal court	6	13%
Ongoing	19	40%
Total	47	100%

Cases Not Removed to Federal Court:

Status Summary	Counts	Percentage
Dismissed - Voluntary	4	10%
Dismissed - Involuntary	3	7%
Settled	15	37%
Ongoing	19	46%
Total	41	100%

[13] This case was stayed on February 27, 2017 on *forum non conveniens* grounds in favor of three related federal cases pending in the District of Massachusetts. Order Staying the Action, *Jackie888, Inc. v. Tokai Pharmaceuticals, Inc.*, et al. (San Francisco Cty. Feb. 27, 2017).

[14] The Court quashed service of summons on defendants on January 31, 2017 and dismissed the plaintiffs' complaint without prejudice. Order Quashing Service of Summons on Defs. and Dismissing Plfs. Complaints Without Prejudice, *Jackie888, Inc. v. Rewalk Robotics Ltd., et al.*, Case No. 16CIV01454 (San Mateo Cty. Super. Ct. Jan, 31, 2017).

APPENDIX C

Securities Act Class Actions Filed Between 2011 and 2016 Settled in California State Courts

	Settlement Year	Docket	Case Name	Settlement Amount
1.	2013	San Mateo County CIV509210	Young v. Pacific Biosciences of California, Inc.	$7,686,495
2.	2015	San Mateo County CIV517481, consolidated on Nov. 22 2013 San Mateo County CIV517185	Toth v. Envivio, Inc.	$8,500,000
3.	2015	San Mateo County CIV522744	Desmarais v. Johnson (CafePress Inc.)	$8,000,000
4.	2015	San Mateo County CIV530291	Plymouth County Retirement System v. Model N, Inc.	$8,550,000
5.	2015	Santa Clara County 1-12-CV-232227	Robinson v. Audience, Inc.	$6,050,000
6.	2016	San Mateo County CIV533203	Firerock Global Opportunity Fund LP v. Castlight Health, Inc.	$9,500,000
7.	2016	San Mateo County CIV534070	Hunter v. Aerohive Networks, Inc.	$5,750,000
8.	2016	Los Angeles County BC560944, consolidated on Nov. 18, 2014 Los Angeles County BC550418	Berliner v. Pacific Coast Oil Trust	$7,600,000
9.	2016	San Francisco County CGC-15-544770	Debotte v. King Digital Entertainment Plc	$18,500,000
10.	2016	San Mateo County CIV536313; consolidated on July 19, 2016 San Mateo County CIV536013	Kleiman v. Sientra, Inc.	$9,650,000[1]
11.	2017	Santa Clara County 1-15-CV-276207	City of Warren Police and Fire Retirement System v. A10 Networks, Inc.	$9,837,500
12.	2017	Santa Clara County 1-14-CV-266866	In re FireEye, Inc. Securities Litigation	$10,250,000
13.	2017	San Mateo County CIV533635, transferred on Nov. 6, 2015 to Santa Clara County 15-CV-287794	City of Warren Police and Fire Retirement System v. Revance Therapeutics, Inc.	$6,400,000
14.	2017	Santa Clara County 1-15-CV-284761, consolidated on Jan. 4, 2016 Santa Clara County 1-15-CV-284001	Steinberg v. MobileIron, Inc.	$7,500,000
15.	2017	San Mateo County CIV536488	Beaver County Employees Retirement Fund v. Avalanche Biotechnologies, Inc.	$13,000,000

Sources:
Cornerstone Research; Stanford Securities Litigation Analytics
All data current as of 8/2/2017

All Filings: Median Settlement Value $8,500,000

[1] The total settlement amount in this case was $10,900,000, however $1,250,000 of that amount was allocated to settlement of a parallel federal case under Section 10(b) of the Securities Exchange Act.

Appendix D

APPENDIX D

Securities Act Class Actions Filed Between 2011 and 2016 Settled in Federal Courts

	Settlement Year	Docket	Case Name	Settlement Amount
1.	2013	11-CV-07673	McKenna et al v. Smart Technologies, Inc. et al.	$15,250,000
2.	2013	11-CV-02769	Dan Katz v. China Century Dragon Media, Inc. et al	$843,333
3.	2013	11-CV-02794	Robert Stanger v. China Electric Motor, Inc., et al.	$3,778,000
4.	2013	11-CV-03936	Gary Redwen v. Sino Clean Energy Inc et al.	$2,000,000
5.	2013	11-CV-81184	Martin J Fuller, et al. v. Imperial Holdings, Inc, et al.	$13,600,000
6.	2013	11-CV-05831	Bhushan Athale, et al. v. SinoTech Energy Limited, et al.	$20,000,000
7.	2014	11-CV-00520	Northumberland County Retirement System, et al. v. GMX Resources, Inc., et al.	$2,700,000
8.	2014	12-CV-00373	Matthew A. Brady, et al. v. Kosmos Energy Ltd., et al.	$10,200,000
9.	2014	12-CV-81123	Francis Howard, et al. v. Chanticleer Holdings, Inc., et al.	$850,000
10.	2014	11-CV-02768	Michael Stern v. China Intelligent Lighting and Electronics, Inc., et al.	$633,950
11.	2014	12-CV-08557	Shirley Horn, et al. v. Hi-Crush Partners LP, et al.	$3,800,000
12.	2015	11-CV-01033	Karsten Schuh, et al. v. HCA Holdings, Inc., et al.	$215,000,000
13.	2015	12-CV-02196	Chaz Campton, et al. v. Ignite Restaurant Group, Inc., et al.	$1,800,000
14.	2015	13-CV-04921	Lewis Booth, et al. v. Strategic Realty Trust, Inc., et al.	$5,000,000
15.	2016	14-CV-03620	Ming Yang, et al. v. Tibet Pharmaceuticals, Inc., et al.	$16,075,000
16.	2016	13-CV-05486	Yun-Chung Tsai, et al. v. Violin Memory, Inc., et al.	$7,500,000
17.	2016	14-CV-03878	Karen J Desrocher, et al. v. Covisint Corporation, et al.	$8,000,000
18.	2016	14-CV-08020	Yedlowski, et al. v. Roka Bioscience, Inc., et al.	$3,275,000
19.	2016	15-CV-03813	Firerock Global Opportunity Fund LP, et al. v. Rubicon Technology, Inc., et al.	$2,500,000
20.	2016	14-CV-09357	Michael Freedman v. MOL Global, Inc. et al.	$8,500,000
21.	2016	16-CV-01941	Linde et al. v. Fifth Street Asset Management, Inc. et al.	$9,250,000
22.	2017	15-CV-03773	Errol Rudman, et al. v. CHC Group Ltd., et al.	$3,850,000
23.	2017	15-CV-08954	Enrico Vaccaro, et al. v. New Source Energy Partners L.P., et al.	$2,850,000
24.	2017	16-CV-02758	Loi Tran, et al. v. Third Avenue Management LLC, et al.	$14,250,000

Sources:
Cornerstone Research; Stanford Securities Litigation Analytics

All Filings: **Median Settlement Value** $4,425,000